

MALAYSIAN REPORTS**CHEAH CHENG HOC v. PUBLIC PROSECUTOR**

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Syed Agil Barakbah S.C. JJ.) September 17, 1985]

[Kuala Lumpur — Federal Court Criminal Appeal No. 28 of 1984]

Criminal Law and Procedure — Contempt of court — Summary procedure for contempt — Concealment of document — Duty of counsel — Duty to client — Duty to court paramount.

Legal Profession — Advocate and solicitor — Counsel — Concealment of document — Contempt of court — Summary punishment.

In this case the appellant, an advocate and solicitor was charged and committed for contempt and sentenced to three days' imprisonment by the learned judge. The charge arose out of an alleged breach of duty as counsel in a civil case, the allegation being that the appellant concealed a document as to affect the credibility of a witness in a civil suit. The appellant appealed.

Held: (1) it is clear that the learned judge was misled on an important matter, that is the concealment of a document so as to affect the credibility of the witness even though it did not directly relate to the issue in the action;

(2) the learned judge was right in this case to find the appellant guilty but the penalty imposed was rather harsh in the circumstances and should be varied to a fine of \$1000 or three months' imprisonment in default of payment.

Semle: It is very important for a counsel to remember that whatever may be his duty to his client his duty to the court remains paramount in the administration of justice.

Cases referred to:

- (1) *Jaginder Singh & Ors. v. Attorney-General* [1983] 1 M.L.J. 71.
- (2) *Tombling v. Universal Bulb Co. Ltd.* [1951] 2 T.L.R. 289.
- (3) *Meek v. Fleming* [1961] 2 I.B. 366; [1961] 3 All E.R. 148, 154.
- (4) *Balogh v. Crown Court* [1974] 3 All E.R. 283, 288.

SUPREME COURT.

Raja Abdul Aziz Addruse (Sri Ram with him) for the appellant.

K.N. Segara (Senior Federal Counsel) for the respondent.

A. Kanesalingam holding a watching brief.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): The appellant, an advocate and solicitor, was charged and convicted for

- A** contempt and sentenced to three days' imprisonment by the learned Judge. The charge arose out of an alleged breach of duty as counsel during a trial while representing the 2nd intervener. We dismissed the appeal but varied the sentence by imposing a fine of \$1,000 or three days' imprisonment in default of payment. We stated we would give our reasons. We do so now.

Briefly, the State Government of Trengganu (plaintiff) sued Solomon Thuraiappah Holdings Sdn. Bhd. (defendant) for specific performance of a contract for the sale of the premises known as the Solomon Court. Three other purchasers of lots in the premises intervened in the proceedings. The plaintiff and the defendant had since come to terms leaving the three interveners to sort out their disputes with the defendant. When the case came up for hearing on May 29, 1984 it was agreed that the claim of the 2nd intervener be dealt with first. Encik Cheah Cheng Hoc appeared for the 2nd intervener and Encik A. Kanesalingam for the defendant.

After the close of the defendant's case Encik Cheah applied to recall Encik Tee Ching Huat, a director of the 2nd intervener, in order to put in a document C.P.5 written by Encik Andrew Ch'ng on June 27, 1980. He explained that he came to know of that document only on May 28, 1984, the day before the hearing. He decided, after discussing with his client, not to produce the document so as not to confuse the court.

The 2nd intervener's story is that the agreement was signed sometime in May 1980 and collected by Encik Andrew Ch'ng from the 2nd intervener on June 4, 1980 as evidenced by the document marked P.4. On the other hand, the defendant's story is that there was no such agreement in existence in May, 1980. Encik Rekhraj, whose firm acted for the defendant, gave evidence to the effect that the agreement was ready for signature on June 25, 1980. He said his secretary received from a person called Andrew a note which reads:

"Kindly allow bearer to collect the sale and purchase agreement for Messrs Tee Hup Seng Holdings Sdn. Bhd. so that we can get it signed by the directors of the company."

As a result he wrote to the defendant a letter dated June 25, 1980, containing, *inter alia*, the following:

"We refer to this morning telephonic conversation with your Mr. Andrew and now forward herewith four (4) copies of the Sale and Purchase Agreements to enable you

to have the said documents executed by two (2) directors at the places marked 'X' in pencil and the affixing of the common seal at the place marked 'Y'."

He said he never got back the agreements.

Encik Cheah realised that if Encik Rekhraj's story was true then P.4 made no sense as there was no agreement in existence until June 25, 1980. So, he sought to put in C.P.5 which is in the handwriting of Encik Andrew Ch'ng and reads as follows:

"27/6/80.
Dear Adam,

Please sign up these agreements and get your sister to sign with the company's seal.

Meantime, please advise Kenny to prepare cheque for the fees of \$720 in the name of Solomon Thuraiappah Holdings Sdn. Bhd.

Please hand over the Pangkor Court Tourist Complex documents to Kenny for reference.

Thanks.

Signed Andrew Ch'ng."

So, on May 28, 1984 there were two documents with conflicting dates. Faced with such a situation the appellant questioned both Encik Adam Tee and Encik Andrew Ch'ng. They could not explain the discrepancies but merely said that as P.4 was prepared by a firm of professional auditors it must be correct. The appellant never took the trouble to check with the firm of auditors as to the correctness of the date before he took the stand to withhold C.P.5. After hearing Encik Rekhraj he realised that the date stated in P.4 could not be right. So, he tried to put in C.P.5 and to recall Encik Tee Ching Huat in order to establish the credibility of the witness. Not surprisingly, the learned Judge took a very serious view of the matter as the appellant knew all along about C.P.5 but suppressed it until confronted by Encik Rekhraj's evidence.

On these facts the learned Judge charged him for contempt for suppressing evidence in the face of the court. Raja Abdul Aziz Addruse with Encik Sri Ram appeared for the appellant and Encik K.N. Segara for the respondent. It was submitted that the learned Judge was wrong to convict the appellant. The court must be satisfied that he deliberately tried to misled the court. The burden of proof was that applicable in a criminal case. There was no proper charge against him. It was said that the date

A of the agreement was not really relevant. He was not deliberately concealing the document. Also, he had apologised to the court for the step he took. If the date was not really relevant then there was no reason for him to withhold the document. He should produce it and examine his witnesses on it and leave it to the court to decide. The charge was clear. Encik Cheah could not say he did not understand it. He was given every opportunity to defend himself.

B
C Both Encik Segara and Encik Sri Ram referred to a letter dated April 22, 1980 which was written to the 2nd intervener as follows:

"We act for Messrs Solomon Thuraiappah Holdings Sdn. Bhd. who have instructed us to prepare an Agreement for the sale of the above property.

D We shall be pleased if you could kindly call on us at your earliest together with your Common Seal to execute the documents which is now ready for execution."

Hence, Encik Sri Ram said the learned Judge was wrong to say that the agreement was not in existence in May, 1980. The point is that the agreement was never in the possession of and signed by the 2nd intervener in May, 1980 but was only collected by Encik Andrew Ch'ng on or after June 25, 1980. Very properly, Encik Segara pointed out that in the light of that letter the 2nd intervener tried to show that the agreement was executed in May, 1980. For that reason the 2nd intervener was advised to rely on P.4 which was dated June 4, 1980 and to withhold C.P.5 which was dated June 27, 1980. There is no doubt that the 2nd intervener was trying to build a case that the agreement was signed in May, 1980, although the statement of claim alleges June, 1980.

G
H The court has power to punish as contempt any misuse of the court's process, e.g., forging or altering of court documents or other deceits of the kind or deceiving the court by deliberately suppressing a fact or giving false facts. Whether the court should deal with the contempt summarily would depend upon the situation in each particular case. In *Jaginder Singh & Ors. v. Attorney-General*⁽¹⁾ the Federal Court made clear that the summary contempt procedure should rarely be resorted to except in those exceptional cases where it is urgent and imperative to act immediately to preserve the integrity of the trial in progress.

I
The learned Judge has dealt with the cases of *Tombling v. Universal Bulb Co. Ltd.*⁽²⁾ and *Meek v. Fleming*⁽³⁾ in some detail. The latter case is in-

structive as the Court of Appeal ordered a retrial on the ground of deliberate concealment of material evidence affecting a party's credibility from the court. The brief facts are that at the trial in October, 1960 of an action for false imprisonment and assault in which the main question was whether the plaintiff's or the defendant's account of the circumstances of the plaintiff's arrest by the defendant at Trafalgar Square and his detention at the police station was correct. It was concealed from the court that in December, 1959, while the action was pending, the defendant had been reduced in rank from chief inspector to station sergeant on a disciplinary charge of having been a party to an arrangement whereby a police constable purported to have arrested a street bookmaker in October, 1959, when the defendant was the officer who in fact made the arrest. This matter was known to the defendant's legal advisers, but neither the plaintiff nor his legal advisers had reason to suspect it. It was deliberately concealed from the court at the trial of the plaintiff's action.

In his judgment Holroyd Pearce L.J. endorsed what Denning L.J., as he then was, said in *Tombling's case*⁽²⁾ relating to the duty of counsel:

"The duty of counsel to his client in a civil case — or in defending an accused person — is to make every honest endeavour to succeed. He must not, of course, knowingly mislead the court, either on the facts or on the law, but, short of that, he may put such matters ... as in his discretion he thinks will be most to the advantage of his client. . . ."

Having distinguished *Tombling's case*⁽²⁾ he went on to say:

"In every case it must be a question of degree, weighing one principle against the other. In this case it is clear that the judge and jury were misled on an important matter. I appreciate that it is very hard at times for the advocate to see his path clearly between failure in his duty to the court, and failure in his duty to his client ... But in my judgment the duty to the court was here unwarrantably subordinated to the duty to the client."

In the present case it is clear that the learned Judge was misled on an important matter, that is, the concealment of a document C.P.5 as to affect the credibility of a witness even though it did not directly relate to the issue in the action. It is very important for a counsel to remember that whatever may be his duty to his client his duty to the court remains paramount in the administration of justice. The appellant believed that the course he took was proper in all the circumstances. He apologised if he was wrong. The learned Judge thought he was wrong. So do we.

A The power of summary punishment is a necessary power to maintain the dignity and authority of the Judge and to ensure a fair trial. It should be exercised with scrupulous care and only when the case is clear and beyond reasonable doubt. As Lord Denning, M.R. said in *Balogh v. Crown Court*:⁽⁴⁾

B "It is to be exercised by the judge of his own motion only when it is urgent and imperative to act immediately — so as to maintain the authority of the court — to prevent disorder — to enable witnesses to be free from fear — and jurors from being improperly influenced — and the like ..."

C This power must be used sparingly but fearlessly when necessary to prevent obstruction of justice. We feel that we must leave the exercise of this awesome power to the good sense of our Judges. We will interfere when this power is misused. We consider that the learned Judge was right in this case to find the appellant guilty. However, we thought the penalty imposed was rather harsh in the circumstances and therefore varied the sentence with the option of a fine.

Appeal dismissed; sentence varied.

E Solicitors: *Sri Ram, Zulkifly & Kumar.*

RAMIAH v. PUBLIC PROSECUTOR

F [F.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah F.JJ.) March 19 & 20, 1984]

[Kuala Lumpur — Federal Court Criminal Appeal No. 30 of 1983]

G *Penal Code, ss. 300 & 304 — Culpable homicide — Exceptions under s. 300.*

Criminal Law and Procedure — Trial by jury — Caution statement — Duty of judge to inform jury that statement was part of the prosecution case — Duty of jury to consider truth of statement and weight to be given to it.

H An offence may amount to culpable homicide under section 304 of the Penal Code even though it does not come within any of the exceptions under section 300 of the Penal Code. If the exceptions under section 300 are not applicable then the learned Judge should not refer to them as they may confuse the jury in their consideration.

I FEDERAL COURT.

J. Nadchatiram for the appellant.

Mohhtar bin Abdullah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.